

## Belief and Environmental Decision-making: Some Recent New Zealand Experience

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*Two key pieces of New Zealand's environmental legislation—the Resource Management Act 1991 and the Hazardous Substances and New Organisms Act 1996—contain references to Maori cultural and traditional relationships with land and other treasures (taonga) and the principles of the Treaty of Waitangi. In some recent controversial cases where Maori spiritual beliefs have been among the relevant environmental risks and effects argued under these provisions, decision-makers have wrongly tested the veracity of the beliefs, rather than focus on the risks to and effects on the people holding the beliefs. More broadly, the cases also show how the practice of including references to matters of belief in what are effectively lists of relevant—and frequently competing—considerations in environmental legislation tends to result in these matters being unlikely to determine decisions in situations where they are uncompromising.*

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*Deux lois-clés néo-zélandaises en matière d'environnement, soit la Resource Management Act 1991 et la Hazardous Substances and New Organisms Act 1996, font des références aux liens culturels et traditionnels entretenus par les Maori avec la terre et autres joyaux (taonga), ainsi qu'aux principes du traité de Waitangi. Dans le cadre de récentes affaires controversées, où les croyances spirituelles des Maori faisaient parties des risques et impacts pour l'environnement invoqués en vertu de ces dispositions, les décideurs ont, à tort, soumis ces croyances à un examen de leur véracité, plutôt que de porter une attention particulière aux risques pour le peuple ayant ces croyances et aux effets sur celui-ci. Plus généralement, ces affaires démontrent aussi pourquoi, lorsqu'on fait référence à des croyances dans ce qui représente des listes de facteurs pertinents, mais souvent concurrents, dont il faut tenir compte*

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*dans les lois sur l'environnement, ces croyances sont peu susceptibles de servir à résoudre des affaires si elles n'ont aucune souplesse.*

## 1. INTRODUCTION

New Zealand's environmental law is mainly comprised of a collection of quite comprehensive, and frequently overlapping, pieces of legislation. Key among these is the *Resource Management Act 1991* (RM Act).<sup>1</sup> More than 50 older Acts were repealed when it was enacted to reform the law relating to the use of land, air and water.<sup>2</sup> In a legislative style continued in later environmental Acts, the RM Act was "front-end loaded"<sup>3</sup> with sections setting out its core purpose — ". . . to promote the sustainable management of natural and physical resources. . ."<sup>4</sup>—and key principles.<sup>5</sup> These principles include references to Maori cultural and traditional relationships with land and other treasures (*taonga*)<sup>6</sup> and the principles of the Treaty of Waitangi.<sup>7</sup> These "Maori provisions" also appear in similar

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1 Reprinted Statutes of New Zealand, no. 32 (New Zealand Government, Wellington, New Zealand); the RM Act and the HSNO Act can be found online on the government website <www.legislation.govt.nz>.

2 RM Act, Long Title.

3 I. Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L. Rev. 673 at 693.

4 Section 5(1); "sustainable management" is defined in s. 5(2) as  
 . . . managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing. . . while—  
 (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonable foreseeable needs of future generations; and  
 (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and  
 (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

5 Sections 6, 7 and 8.

6 Section 6(e). Note that in this article, I have put English translations of Maori words first, with the Maori words following in italics. The translations are my own; most of the Maori words are in fairly common usage in New Zealand.

7 The Treaty of Waitangi was signed in 1840 between some 50 Maori chiefs and representatives of the British Crown. In it, ". . . the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees" (*New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641 at 643, per Richardson J). The British Crown's obligations under the Treaty have since passed to the Crown in Right of New Zealand. Key among the Crown's Treaty guarantees is the Article 2 promise to protect for Maori the ". . . unqualified exercise of their chieftainship over their lands their villages and over their treasures all" (I.H. Kawharu, ed., *Waitangi—Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) at 319). The Treaty guarantees are not part of New Zealand's domestic law unless they are incorporated into domestic legislation. Most examples of legislative incorporation refer to the

terms and in similar ways in the *Hazardous Substances and New Organisms Act 1996* (HSNO Act),<sup>8</sup> which aims to protect the environment by preventing or managing the adverse effects of hazardous substances and new organisms, including genetically modified organisms (GMOs).<sup>9</sup>

In both Acts, the "Maori provisions" are included among the other purpose and principles provisions representing different—and often competing—interests. The RM Act's purpose and principles have been repeatedly criticized in terms that seem to apply equally to the HSNO Act's provisions: that the concepts are too vague and that the practice of including lists of relevant principles, albeit at times with some priority indicated between them, tends to "...entrench dispute rather than to promote dispute resolution."<sup>10</sup> The "Maori provisions" in particular have been further denigrated as "socially divisive", "... a trap for Maori. . ."<sup>11</sup> and unworkable.<sup>12</sup>

This article is about some recent high-profile cases—known as the "transgenic cattle" and "taniwha" cases<sup>13</sup>—where Maori spiritual or cul-

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"principles" of the Treaty. These principles are generally said to be: the principle of partnership (the two Treaty partners, the Crown and Maori, must act reasonably and in good faith towards each other); the principle of active protection (the Crown must actively protect Maori in the use of Maori resources); the principle of redress (the Crown must not unreasonably impede its capacity to provide redress for past breaches of the Treaty); the principle of information (the Crown should be fully informed of the implications of its policies for Maori and the Treaty); and the principle of government (it is the Crown's right to pursue policy in the interests of all New Zealanders). These are derived from the Court of Appeal's decision in *New Zealand Maori Council*, *ibid.* in respect of the *State-Owned Enterprise Act 1986*, s. 9. The Courts have recognized that different principles may operate under other Acts (for example, the RM Act, see *Haddon v. Auckland City Council* (1993) 1 ELRNZ 8, [1994] NZRMA 49). In the context of the HSNO Act, it appears from its decisions that ERMA has generally accepted that s. 8 encompasses the principles of making informed decisions, ensuring that consultation has occurred, acting reasonably and in good faith, actively protecting Maori taonga, and recognizing Maori chieftainship or rights to manage and control (*rangatiratanga*) over ancestral lands and taonga.

8 The Statutes of New Zealand 1996, no. 30 (New Zealand Government, Wellington, New Zealand), ss. 6(d) and 8.

9 This is according to its s. 4 purpose.

10 Williams, *supra* note 3 at 677. Also see, for example: J. McLean "New Zealand's Resource Management Act 1991; Process with Purpose?" (1992) 70 Otago L. Rev. 538, and B.V. Harris "Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt" (1993) 8 Otago L. Rev. 52.

11 I. Williams, "The Minister's Prison and the Cultural Prison: Lessons from the Northland Litigation" (2003) 20 N.Z.U. L. Rev. 320 at 335 and 336.

12 R. Ahdar, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments" (2003) 23(4) Oxford J. Legal Stud. 611.

13 The decisions addressed are: the Environmental Risk Management Authority's (ERMA) two decisions on Application GMF98009 (November 18, 1999 and May 23, 2001), and

tural beliefs have been among the relevant risks and effects considered by decision-makers under the RM Act and the HSNO Act. Environmental decision-making under these Acts centres on the assessment and evaluation of the risks and/or effects of proposed activities, within the context of the purposes and relevant principles of the legislation.

Some of the decision-making in these cases is open to criticism, including the general approach of weighing up the risks and effects, including belief-based ones, of proposals against each other. This is said to allow for good decision-making that is tailored to the facts, but it is of course highly judgmental. This can make decisions seem unpredictable, which has implications for the rule of law, and presents a challenge to practitioners. But in many ways, the exercise of judgment is in fact entirely predictable. Although the balancing approach means that any risk or effect—including one based on belief—can *in theory* prevail to determine a decision, depending on its relative significance in terms of the Act's purpose and principles, the reality is that even deeply-held beliefs with serious, but unproven, consequences are unlikely to halt an otherwise beneficial proposal in situations where no compromise between the proposal and the belief is apparent.

The cases also raise wider concerns about including belief-based risks and effects in the legislation, especially in such vague terms as they appear. The Environment Court (and its predecessors)<sup>14</sup> has been dealing with beliefs for a while, albeit in perhaps less dramatic and engaging factual contexts as featured in the *taniwha* case, and its decisions reflect this quite well. But the Environmental Risk Management Authority's<sup>15</sup>

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its decision on Application GMD02028 (September 30, 2002); the High Court's decision on the appeal against ERMA's decision of November 18, 1999 in *Bleakley v. Environmental Risk Management Authority* [2001] 3 NZLR 213; the Environment Court case *Beadle v. Minister of Corrections*, unreported (April 4, 2002), Environment Court Auckland, Decision A74/02; and the High Court and Court of Appeal decisions on the *Beadle* case, *Friends and Community of Ngawha Inc. v. Minister of Corrections* [2002] NZRMA 401 (HC) and *Friends and Community of Ngawha Inc. v. Minister of Corrections*, (2002) 9 ELRNZ 67, [2003] NZRMA 272 (CA). ERMA's decisions are all available on its website, <[www.ermanz.govt.nz](http://www.ermanz.govt.nz)>.

- 14 The Environment Court is the specialist court whose statutory jurisdiction is to hear appeals (primarily from decisions of local and consent authorities) under the RM Act. Its decisions may be appealed on questions of law, or judicially reviewed, in the High Court of New Zealand.
- 15 The Environmental Risk Management Authority was established under the HSNO Act to determine applications for the import, development, testing or release of new organisms including genetically modified organisms. ERMA's decisions on these issues may be appealed on questions of law, or judicially reviewed, in the High Court of New Zealand.

handling of belief in the transgenic cattle cases seems uneasy, and even impatient.

## 2. THE TRANSGENIC CATTLE CASES

The first "transgenic cattle case" was decided by the Environmental Risk Management Authority (ERMA), appealed to the High Court, and then referred back to the ERMA. It concerned an application to field test genetically modified cattle, to see if the modified cows expressed human myelin basic protein in their milk.<sup>16</sup> The production of the embryos, and the field tests, would take place at Agresearch's Ruakura Research Centre in Waikato. This case was in progress while a debate on genetic engineering was raging in New Zealand. The debate forced a moratorium on, and Royal Commission inquiry into, genetic modification.<sup>17</sup>

The application in the second, more recent, case was similar but wider. It was to develop in containment cattle modified with a range of genes derived from humans, mice, cattle, deer, sheep, goats, and other genetic sequences. The object was to get the cattle to express "functional therapeutic foreign proteins" in their milk, and to study gene function and genetic performance.

Both applications were made and decided under the HSNO Act, which controls the development and testing of GMOs by requiring these activities to be authorized by ERMA (or its delegate). Like the RM Act, the HSNO Act focuses on managing the environmental effects of the activities it controls. The Act puts the evaluation of the risks and effects of the activities at the centre of decision-making on applications. Basically, applications can be approved if "... the beneficial effects of having the

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16 The original applications were for three new organisms, but two of them were approved earlier in ERMA Decision on Application GMF98009, November 18, 1999. This application was different, and was challenged, because human genes were to be used to modify the cattle.

17 The two-year moratorium on the release of genetically modified organisms (GMOs) into the environment was given legislative effect via amendments to the HSNO Act and ran from October 29, 2001 until October 29, 2003. The biotechnology industry voluntarily withheld applications to field test GMOs over the same time period. Meanwhile, the Royal Commission on Genetic Modification conducted its inquiries. Its report can be found online at <[www.gmcommission.govt.nz](http://www.gmcommission.govt.nz)> (and see J. Hope, "New Zealand Royal Commission on Genetic Modification" (2001) 18 EPJL 441). At the Commission's instigation, a Bioethics Council (*To te Taiao*) was established to look at wider issues concerning the use of biotechnology in New Zealand. Its first report on *The Cultural, Ethical and Spiritual Dimensions of the Use of Human Genes in Other Organisms* was released in 2004 and may be viewed online at <[www.bioethics.org.nz](http://www.bioethics.org.nz)>.

organism in containment outweigh the adverse effects of the organism.”<sup>18</sup> Like the RM Act, HSNO Act defines “effect” widely, to include potential, probable, positive, adverse, temporary, permanent, past, present, future, acute, chronic, and cumulative effects.

Decisions have to be made in the context of the Act’s s. 4 purpose — “. . . to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of . . .” new organisms — and its principles. These include the life-supporting capacity of ecosystems, the maintenance and enhancement of peoples’ capacity to provide for their well-being (including cultural well-being), public health, economic benefits, and the “. . . relationship of Maori and their culture and traditions with their ancestral lands, water, sites, [sacred places (*waahi tapu*)],<sup>19</sup> valued flora and fauna, and other [treasures (*taonga*)]”.<sup>20</sup> Decision-makers are also directed to take into account both the “need for caution” in managing adverse effects that are scientifically uncertain, and the principles of the Treaty of Waitangi.<sup>21</sup> The Hazardous Substances and New Organisms (Methodology) Order 1998<sup>22</sup> gives detail on how the risks, costs and benefits of new organisms should be evaluated when applications are decided. In general terms, it says that applications may be approved where the benefits associated with the organism outweigh the risks and costs to the environment and human health and safety.<sup>23</sup>

The decisions in the two transgenic cattle cases are interesting examples of how ERMA has approached its wider task of evaluating the risks, and weighing the costs and benefits or adverse and positive effects of proposals. Although I have made a few brief comments about ERMA’s

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18 Section 45(1)(a)(ii), the qualifier ‘should it escape’ was removed from the end of this test in 2003. The application must also be for a purpose specified in s. 39(1), and the Authority must be satisfied that it can be adequately contained. Sections 44 and 37 give additional matters to be considered: the ability of the organism to escape and establish itself, and the ease with which it could be eradicated. Some low risk applications to develop GMOs can be dealt with under s. 42’s rapid assessment procedure.

19 The Maori words are used in the legislation. The correct pronunciation of “wahi” is with a long “a” sound, as in “waahi”—hence both spellings are used. The long vowel sound may otherwise be indicated by a macron, but this feature is frequently not available in standard typesetting arrangements.

20 It is generally accepted that the term “taonga” includes both physical and metaphysical treasures.

21 Sections 7 and 8 respectively.

22 SR 1998/217.

23 Clauses 26 and 27; the Methodology Order defines ‘cost’ as “the value of a negative effect,” ‘benefit’ as “the value of a positive effect” and ‘risk’ as “the combination of the magnitude of an adverse effect and the probability of its occurrence.”<sup>25</sup>

approach, the real point here is to discuss how ERMA has dealt with opposition against genetic modification that is based on cultural or spiritual belief.

### 3. TRANSGENIC CATTLE 1: GMF98009

The first application to produce and field test cattle containing a genetic construct comprising the sequence coding for human myelin basic protein was opposed on a series of grounds including possible risks to the environment, public health, and the relationship of Maori, and their culture and traditions, with taonga.

ERMA approached its task by evaluating the potential adverse effects, noting the beneficial effects, and then deciding that the benefits outweighed the risk of adverse effects. There are four outstanding features of ERMA's reasoning. The first is that there is very little of it—a general characteristic of the GM applications as a whole has been ERMA's emphasis on imposing controls to minimize the risks of GM to what it was satisfied were negligible levels, or at least close to them. "For this reason ERMA's published decisions give little guidance as to how the difficult process of weighing up risks, costs and benefits of [GM] applications will be carried out in practice."<sup>24</sup>

The second feature of the reasoning is that the discussion of adverse effects concentrates almost exclusively on the likelihood that the effects will occur, with very little consideration given to the magnitude of the effects should they occur. This observation is consistent with the findings in a recent study of decision-making under the Act.<sup>25</sup> The problem is that proper risk assessment means considering both the likelihood of occurrence and the magnitude of the effect should it occur.<sup>26</sup> Because ERMA focuses on likelihood of occurrence (and on reducing it via controls) almost exclusively, it finds all of the anticipated risks to be negligible, even though some of the effects are potentially of great magnitude. If more attention was paid to the magnitude of the possible effects, a decision

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24 J. Hope, "A History of Biotechnology Regulation in New Zealand" (2002) 6 NZJEL 1, at 26; further discussion of ERMA's decision-making, and wider issues, can be found in C. Voigt, "The Precautionary Principle and Genetic Engineering in New Zealand: Legal and Ethical Implications" (2002) 6 NZJEL 43.

25 J. Shaw, *Decision-making under the Hazardous Substances and New Organisms Act 1996*, unpublished LL.B. (Honours) dissertation, University of Otago, 2001.

26 As ERMA itself recognizes in its *Technical Guide 1: Identifying Risks*, ER-TG-01-1 9/99, September 1999, at 14.

that a risk—unlikely as it may be to occur—is simply not worth taking could be reasonably arrived at.

Third, ERMA makes no real effort to quantify the anticipated benefits, or indeed to evaluate whether or not they will actually occur. It simply describes the benefits as “expected” or “likely to accrue.” This observation seemingly flows from the first—perhaps because ERMA is satisfied that the risks are negligible, *any* benefit will be enough to outweigh the costs of the application. The benefits of the application are listed in just over one page of the decision, and are: specific gains in scientific knowledge; economic benefit and capacity building to be derived from the research occurring in New Zealand; encouragement to biotechnology research (including the retention of intellectual capital); and encouragement to the dairy and pastoral industries in New Zealand. The danger here is that participants in the process—both applicants and opponents—will be left dissatisfied by decisions because of the lack of reasoning supporting them.

Finally, little to no mention is made of the specific provisions of the Act or Methodology Order being applied. This is left to the reader’s imagination or powers of deduction.<sup>27</sup> In particular, there is no express mention of s. 7 (which advocates caution in managing adverse effects that are scientifically uncertain).<sup>28</sup> This can be explained partly by the reliance placed on controls to minimize risks. In the end, ERMA’s failure to deal expressly with the Methodology Order turns out to be the basis of the successful appeal to the High Court.<sup>29</sup>

Most of the decision focuses on the objections raised by Ngati Wairere, the sub-tribe (*hapu*) claiming authority over the land (*mana whenua*) where the research station is located. In ERMA’s words:<sup>30</sup>

Ngati Wairere believe that genetic modification involving different species is contrary to their [customs (*tikanga*)], because it interferes with the [genealogy

27 There is a short statement at the beginning of the decision, stating that the application was “. . .determined in accordance with *section 45*, the additional matters contained in *sections 37 and 44*, and the matters set out in Part II of the Act. Consideration of the application followed the relevant provisions of the [Methodology Order]” and occasional references to specific sections in Part II, but nothing else.

28 Section 7 provides: “All persons exercising functions, powers and duties under this Act. . . , shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.”

29 ERMA’s decisions in respect of applications to import, develop, field-test or release new organisms can be appealed to the High Court on a question of law (HSNO Act, s. 126). The High Court is New Zealand’s first court of superior jurisdiction (below it in the hierarchy of courts are the specialized courts and tribunals, and the District Court which is wholly a creature of statute) and its decisions are subject to appeal in the Court of Appeal and then the Supreme Court of New Zealand.

30 GMF98009 at 12.



(*whakapapa*)] as well as the [life force or essence (*mauri*)] of both species. They believe their *kaitiakitanga* (spiritual guardianship) extends to imported species such as cattle which have a long presence in New Zealand and which could be regarded as valued species in terms of section 6(d) of the HSNO Act.

They also believe that both *whakapapa* and *mauri* will be interfered with even though the genetic sequence inserted in the embryo has been synthesized from information obtained from an international gene bank which will have derived DNA originating from a non-Maori person. They believe that to proceed with genetic modification of any kind, but transgenic modification in particular may result in members of Ngati Wairere suffering adverse health consequences and even death.

ERMA was divided on the impact of these beliefs on the application, but the majority decided that it should be granted despite them. Following a brief mention of the relevant provisions of the Act,<sup>31</sup> the majority moved on to the issue that troubled it the most: the intangible nature of the *taonga* the subject of the objections. In its discussion on s. 6(d), the majority used this point to distinguish the RM Act cases sufficiently so as to allow it to reach its own conclusions,<sup>32</sup> and also, arguably, to help free it from having to consider declining the application to protect the Maori interests. The majority said that the RM Act cases,<sup>33</sup>

involved what might be regarded as tangible or physically distinguishable *taonga*, whereas in the present instance the Authority is required to assess the weight to be given to *taonga* which are spiritual beliefs themselves, rather than something physically distinct to which spiritual values attach.

In fact, Ngati Wairere had adopted a two-pronged attack. This first prong was put under s. 6(d) (which refers to the relationship of Maori culture and tradition with *taonga*), and said that the GM would affect the *whakapapa* and *mauri* of the two species involved: cattle and humans. This was never even considered by the majority, despite cattle and humans clearly being “physically distinct.”

The second prong of the argument was made under s. 8 (the Treaty principles section), and was that “. . . *whakapapa* and *mauri* . . . are *taonga*, requiring active protection. . . .”<sup>34</sup> The majority was convinced that spiritual beliefs “. . . are not amenable to active protection in the same way as more tangible *taonga*,”<sup>35</sup> and took the view that none of the Treaty

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31 Being ss. 6(d) and 8.

32 GMF98009 at 14.

33 Ibid.

34 Ibid. at 16.

35 Ibid. at 17.

cases that have come before the courts and the Waitangi Tribunal<sup>36</sup> over the years have addressed beliefs “. . . in contrast to more tangible taonga with spiritual significance.”<sup>37</sup> This is questionable, at least when it comes to what (beliefs, or something more tangible) was being protected in the earlier cases. Take, for example, the many court and Tribunal cases that have considered the issue of Maori beliefs and ‘cultural sensitivity’ associated with the diversion of, and discharge of, waste into water. The Maori objection has often been that diverting and mixing water from two different water bodies, or discharging effluent into water, damages the mauri of the water. The Tribunal, the Environment Court, and indeed the High Court has had little trouble in accepting the belief that this damage occurs, and is a relevant value that should be protected.<sup>38</sup> The majority in the transgenic cattle case went on to decide that “. . . active protection as sought . . . would mean that . . . decisions . . . under the HSNO Act should be made according to the tenets of Maori . . . beliefs,” but that s. 8 “. . . does not extend to accepting those beliefs as the determinant. . .” of applications in this way.<sup>39</sup>

This idea that Maori beliefs cannot determine applications resurfaced when the majority discussed the ‘practical consideration’ of the precedent

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36 The Waitangi Tribunal was established under the *Treaty of Waitangi Act 1975*. Its primary function is to investigate claims by Maori that they have suffered prejudice as a result of Crown action that breaches the principles of the Treaty of Waitangi. For more on the Tribunal, see J. Hayward and N.R. Wheen, eds., *The Waitangi Tribunal—Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington: Bridget Williams Books, 2004).

37 GMF98009 at 17.

38 The obvious High Court case is *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188. In this case, the precise issue was whether or not the phrase “the interests of the public generally” should be held to include Maori spiritual and cultural values in an Act” (the *Water and Soil Conservation Act 1967*) that did not refer expressly to Maori values or the Treaty of Waitangi. Chilwell J. held that they could not be excluded as the Act was “. . . so deficient in guidelines that the Court has to resort to extrinsic aids [including] the Treaty of Waitangi. . .” (at 223). It was the values themselves, not the water to which the values attached, that were considered. A good example of the Planning Tribunal (which became the Environment Court) expressly observing that the Maori cultural opposition to the discharge of effluent into water is relevant no matter how “clean” the water can be shown to be is *Te Runanga o Taumarere v. Northland Region* [1996] NZRMA 77, where Judge Sheppard found on the facts of the case that “. . . Maori people have traditionally, and still currently take, shellfish from Te Uruti Bay both as food and as customary delicacies for cultural occasions; and that if the proposal [which was for the discharge of residual high quality treated effluent from a sewage treatment plant into a natural wetland and traditional shell fishing ground] is implemented, then no matter how pure the effluent, there are Maori people who would no longer take shellfish there, and who would regard the passing of the effluent from the treatment works into the waters of Te Uruti Bay as an affront to their standing as [people of the land (*tangata whenua*)] and [guardians (*kaitiaki*)]” (at 86).

39 GMF98009 at 17.

value of the decision for all other transgenic modification applications. The majority candidly admitted to being influenced by its concern that a decision in favour of Ngati Wairere could put an end to all transgenic research in New Zealand.<sup>40</sup> This concern must have been exacerbated by the majority's view that the beliefs tendered "... govern behaviour in an absolute way, and simply preclude research of the kind proposed by the applicant."<sup>41</sup> In fact this is not so—as the majority itself recognized in its very next sentence. The research could have been conducted elsewhere, out of Ngati Wairere's territory (*rohe*). There is nothing in the case to suggest that Agresearch considered conducting the field tests at another of its research stations, or was asked to do so. There is one reference to a suggestion that other Maori groups share Ngati Wairere's beliefs, but this is simply not pursued in the decision.

The final criticism that has to be made of the majority's decision is the lack of empathy and tolerance that it displays. First it expresses its doubts—with no evidence to support it—that the beliefs are widely held, "... given that [they] would have been developed well before human-kind had any appreciation of ... the scientific possibility of transporting gene sequences between species."<sup>42</sup> Then the majority notes that it has had "... difficulty in appreciating how [the proposal could] lead to the claimed adverse consequences."<sup>43</sup> The comments seem derisory, and are unnecessary and probably misguided.

The minority also emphasized the potential precedent value of the decision, and the absolute nature of the beliefs which meant that the affront to Ngati Wairere could only be avoided by not proceeding with the trials. Its concern was that the majority's decision:

sets a precedent which may make similar decisions more likely, and that... [the] consequential depression and mate Maori [Maori illness] arising from such repeated trauma will affect the ability of [the Maori] community to provide for their own economic, social and cultural wellbeing, and affect the relationship between the culture and their ancestral lands.<sup>44</sup>

Unlike the majority, the minority paid attention to the magnitude of the potential adverse effects on the health and well-being of Ngati Wairere. These were described as being of such gravity as to outweigh the potential

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40 Ibid. at 18.

41 Ibid. at 15.

42 Ibid.

43 Ibid.

44 Ibid. at 23-24.

benefits, which were found to be “hypothetical”, “insubstantial”, and “insufficient.”<sup>45</sup>

ERMA’s decision in the first transgenic cows case was challenged on 23 grounds in the High Court in *Bleakley v. Environmental Risk Management Authority*.<sup>46</sup> The appeal succeeded due to ERMA’s failure to clearly state the criteria in the Methodology Order applied, and indeed to even apply cls. 9, 10 and 13 of the Order. A non-material error of law was also found in ERMA’s consideration of the precedent effect of the decision—according to McGechan J., the Authority was required to “. . . proceed case by case. . . [i]f the decision is the right one, and there is no distinction available for others, then it will be the right one again however inconvenient.”<sup>47</sup>

As far as the issues of belief are concerned, five errors of law were alleged. They were that ERMA erred by: treating s. 6(d) as excluding intangible taonga; failing to take s. 6(d) matters properly into account; determining that intangible taonga are not amenable to active protection under s. 8 in the same way as tangible taonga; considering the beliefs (rather than the adverse effects taking into account the beliefs) and finding that they did not justify a decision to decline the application; and saying that Maori spiritual values cannot prevail to determine a decision.

None of these grounds succeeded. The Court found that the reference to “other taonga” in s. 6(d) includes intangible cultural and spiritual taonga “. . . in accordance with usual concepts and in accordance with the Treaty.”<sup>48</sup> But, it said, ERMA had not held otherwise, and had not failed to consider s. 6(d), but rather had found that its concerns were outweighed on the facts. Similarly with s. 8, ERMA had not erred by excluding spiritual beliefs from the Treaty duty of active protection, or by finding that Maori beliefs cannot prevail—“[s]uch a determination if made would have been wrong, but it was not made”<sup>49</sup>—it has simply found that they were outweighed in a “. . . weighing process open to the authority in law.”<sup>50</sup> According to McGechan J., if an application “. . . involved less potential benefit for New Zealand, perhaps by an overseas company unwilling to share the information gleaned, or by a company unable to offer comparable containment, in relation to which Maori were able to

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45 Ibid. 22.

46 *Supra* note 13.

47 Ibid. at para. 293.

48 Ibid. at para. 65.

49 Ibid. at para. 86.

50 Ibid. at para. 83.

advance better substantiated evidence of potential injury to health. . .”,<sup>51</sup> or if, according to Goddard J., it offended against beliefs that were “significant”,<sup>52</sup> then a decision could go the other way, and an application could be declined on these grounds. But the judges were unable to offer any guidance on the vexed question of how spiritual values can be measured, quantified and weighed.<sup>53</sup>

ERMA was instructed to re-consider the application. Its second decision was released on May 23, 2001. It makes specific reference to the provisions in the Methodology Order it applies, and corrects other non-material errors identified in the first decision by the High Court. The majority and minority discussions on the Ngati Wairere objections are substantially the same as in the first decision, except that the references to the precedent value of the decision are gone.

#### 4. TRANSGENIC CATTLE 2: GMD02028

The second transgenic cattle case was decided in 2002. It was to develop in containment cattle genetically modified “. . . with a range of genes derived solely from humans, mice, cattle, deer, sheep, and goats and other genetic sequences, including reported and selectable marker genes and expression control sequences, derived from both specified and non specified organisms.” The scope of this application, in terms of the description of the organisms covered, was found to be too wide to enable proper risk assessment to take place, and restrictions were imposed by ERMA in the first annex to the decision.

As with the first transgenic cattle case, there are some general points about ERMA’s reasoning in this case which deserve to be made before the focus is narrowed to the matters of Maori spiritual belief. The first point to note is that ERMA considers risks and costs together. It explains this at a purely practical level: there were, it said, no costs associated with this proposal that did not arise from its risks. This probably has very little practical effect on the reasoning or decision, but it potentially adds to the level of confusion that the decisions, along with the Act and Methodology, generate.<sup>54</sup> The second point to note about ERMA’s reasoning is that it continues to emphasize the use of controls to lower the risks to proposals

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51 Ibid. at para. 87.

52 Ibid. at para. 366.

53 In *Bleakley*, at para. 364, Goddard J. could only say that “. . . the situation must be assessed on a case-by-case basis.”

54 See the discussion in Shaw, *supra* note 25 at 19-29.

to a low or negligible level. Again, this means that very little attention is paid to evaluating the benefits of the proposal and weighing them against its risks/costs.

ERMA seems just as uncomfortable with evaluating and counting the matters of Maori spiritual belief in this case as in the first transgenic cows case. It is quite prepared to say what it thinks the beliefs imply about transgenic gene transfer, and to suggest that any offence to those beliefs that could arise can be mitigated through “. . . ongoing dialogue and appropriate [prayers (*karakia*)], provided the motive and purpose of the research are identified and articulated.”<sup>55</sup> It is, however, not happy about assessing the likelihood and magnitude of the risks to the beliefs,<sup>56</sup> or about protecting the beliefs by declining applications. On this last point, ERMA persists in making the same statements, and using the same language, as it did in the first case and which were challenged on appeal. ERMA repeats its view that the HSNO Act, s. 8 does not extend to deciding applications “. . . according to the tenets of Maori spiritual beliefs. . .”,<sup>57</sup> and that the duty of active protection “. . . does not extend to accepting those beliefs as the determinant. . .”<sup>58</sup> of the application.

ERMA should exercise more caution in making these statements in view of the High Court’s findings that Maori beliefs could potentially prevent an application from proceeding.<sup>59</sup> ERMA’s comments are only acceptable if constrained to this application and taken to mean that, *in this case*, the beliefs were not significant enough, and the benefits were sufficient to outweigh them. ERMA might be uncomfortable handling and protecting beliefs, but “[t]he New Zealand Parliament has mandated, nevertheless, that Maori spiritual concerns be squarely addressed in [the] legislative scheme[] and [ERMA] cannot avoid determining metaphysical matters [it] would normally eagerly side-step.”<sup>60</sup>

There is one major difference between ERMA’s reasoning on the beliefs raised in this transgenic cattle case, compared with the first case. In an improvement on its approach in the first case, the Authority notes that transgenic gene transfer provides a new and difficult *application* for traditional and established Maori beliefs. But it then goes on to do something quite concerning: it analyzes the Maori concepts of *mauri* and

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55 GMD02028 at 36.

56 Ibid. at 36.

57 Ibid. at 37.

58 Ibid. at 38.

59 *Bleakley*, *supra* note 13 at paras 83 to 87, per McGechan J. and 366 per Goddard J.

60 Ahdar, *supra* note 12 at 634.

whakapapa and gives its *own view* as to whether or not transgenic gene transfer offends them.

On mauri, it begins with its understanding that “[e]ach gene . . . contains its own mauri, the mauri of the gene, which allows it to exist and function. However the gene does not have the mauri of the organism from which it is extracted.”<sup>61</sup> Thus, it reasons, “. . . the gene does not introduce the mauri of the human into the cow. . . . [Therefore] there does not appear to be a sound Maori religious objection to the process of genetic modification per se.”<sup>62</sup> On whakapapa, it decides that the opinions of two Maori submitters (Te Kotuku Whenua and Te Runanga o Ngai Tahu) that gene transfer could interfere with whakapapa, presenting potential dangers to people and the natural world are based on a “. . . misunderstanding of both the science and traditional Maori thought.”<sup>63</sup> Although it does go on to say that the beliefs must be weighed in making the decision, meaning they are not ignored, it has still taken a very grave step in setting itself up as some kind of arbiter on the veracity of the claimed beliefs.

## 5. THE TANIWHA CASES

The so-called “taniwha cases”<sup>64</sup> arose under the *Resource Management Act*. This Act puts in place systems for the sustainable and integrated management of natural and physical resources. It and the policy statements and plans made under it control the use of land, air, and water. Activities that are not authorized by the Act or plans require resource consents. Consent authorities (councils and the Environment Court) grant or refuse consents according to ss. 104 and 105.

Section 104 and the Act’s s. 5 purpose (“ . . . to promote the sustainable management of natural and physical resources. . . .”) put the focus of decision-making squarely on the environmental effects of proposals. These effects have to be considered recognizing the principles set out in ss. 6, 7, and 8. For the purposes of this article, the key provisions are ss. 6(e) and 8. These mirror ss. 6(d) and 8 of the HSNO Act. Section 6(e) refers to “. . . the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga,” and s. 8 requires

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61 GMD02028 at 33.

62 Ibid. at 33-34.

63 Ibid. at 34-35.

64 A taniwha is a spiritual guardian, often of water, and often characterized as a monster or dragon-like creature.

decision-makers to take the principles of the Treaty of Waitangi into account.

This section analyzes the approach of the Environment Court, High Court and Court of Appeal to issues of belief raised under the RM Act in the "taniwha" litigation. According to Williams, "[t]aken together as a set, the decisions delivered in the . . . litigation reveal the folly of incorporating immeasurable cultural beliefs into the legal process and expecting judges to resolve irreconcilable views founded on those beliefs."<sup>65</sup> The litigation began when the Far North District Council supported the land-use designations, and the Northland Regional Council refused the Minister's applications for resource consents, necessary to establish a new prison in Northland. The Regional Council said that:<sup>66</sup>

[t]o grant the applications would result in significant adverse effects on the ancestral lands, water, wahi tapu and other taonga of Ngati Rangi and Ngapuhi. It would also fail to enable them as tangata whenua to provide for their social well-being.

There were cross-appeals to the Environment Court, which confirmed the consents and requirements, and further appeals to the High Court. Wild J. upheld the Environment Court's decision, and then refused leave to appeal to the Court of Appeal. Special leave to appeal from the Court of Appeal itself was refused on the basis that any appeal would be unsuccessful because the Environment Court had adequately accommodated the appellants' cultural beliefs.

Among the arguments made opposing the development of the prison, were some concerned with the prison's effects on (the beliefs held about) a taniwha named Takauere. In contrast to the transgenic cattle cases, the Maori making these arguments held differing opinions about the taniwha and how the prison might affect him. On this, the Environment Court observed:

[W]e have no right to expect that all Maori will necessarily agree on questions such as the particular relationship of Maori, and their culture and traditions, with particular land, water, and so on. . . . The role of decision-makers under the . . . Act is to identify carefully the question raised by the statutory provision, to hear the attitudes and evidence of the parties . . . on that question, and then to make its findings. The duty to do so cannot be avoided because Maori are not in agreement over it.

And so the Court went on to hear the evidence on the taniwha. This ranged from opinions that he inhabited all of the waters of Tai Tokerau,

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65 Williams, *supra* note 11.

66 Beadle, *supra* note 13 at para. 371.



and would be harmed by the prison, to assertions that the taniwha concept was being exploited by the prison's opponents, and that "... using the site for caring for those who have needs and helping them heal would not offend the taniwha if there is such a manifestation in one's mind."<sup>67</sup>

The Court found that "... there are people who believe in the existence of the taniwha, Takauere, and respect what it stands for."<sup>68</sup> It referred to the affirmation in the New Zealand Bill of Rights 1990 of the right to freedom of belief, and the right to manifest belief, and expressed its respect for the rights of those who believe in the taniwha.<sup>69</sup> Nevertheless, said the Court, the RM Act "... does not extend to protecting the domains of taniwha, or other mythical, spiritual, symbolic or metaphysical beings."<sup>70</sup>

The Court focused on the purpose of the RM Act, the definition of "environment", and the text of ss. 6(e), 7(a) and 8. None of these, it said, indicate that decision-makers "... are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities."<sup>71</sup>

The Court alluded to the practical difficulties associated with asking judicial bodies to decide questions about spiritual beings. These arise, it said, because "... there is no reliable basis for deciding conflicting claims about the beings the subject of the belief,"<sup>72</sup> and because judicial findings are based on the balance of probabilities so "... the members of the Court are not compelled to find the taniwha exists, or ... would be adversely affected, if [they] are not persuaded by the evidence of those facts."<sup>73</sup>

This is a point that bears some analysis, especially since it has arisen in other cases recently, including the second transgenic cattle case and *Ngati Hokopu ki Hokowhitu v. Whakatane District Council*.<sup>74</sup> In the second transgenic cattle case, ERMA made findings to the effect that the GM proposal would not offend mauri and whakapapa as was claimed. This involved giving its views on what whakapapa and mauri mean. These findings go too far, as *Ngati Hokopu ki Hokowhitu* shows. In this case, the Environment Court had to deal with an assertion that the land, the

67 Ibid. at paras 415-435; the quote is from para. 425.

68 Ibid. at para. 436.

69 Ibid. at paras 436-438.

70 Ibid. at para. 439.

71 Ibid.

72 Ibid. at para. 440.

73 Ibid. at para. 441.

74 Unreported, (December 13, 2002) Environment Court Christchurch, Decision no. C168/2002.

subject of the proposal, was wahi tapu. Judge Jackson ventured on a discussion of the concept of cultural relativity during which he made the point that values are "...subjective and non-justiciable. . .",<sup>75</sup> but that Courts can "... decide issues raising beliefs about those values. . .".<sup>76</sup> So, the Court could say whether or not the evidence supported the status of the land as wahi tapu, but could not (and did not in any way attempt) to evaluate the concept of wahi tapu itself.

It would be most unwise to refute the idea that Courts should not be in the business of deciding the content of beliefs.<sup>77</sup> The Environment Court in the taniwha case correctly identified the issues that lay beyond its competence. The problem with its judgment is that it then goes on to misapply its own ruling by making just such a finding about the content, rather than existence, of the beliefs. It says: "[n]one of us has been persuaded . . . that, to whatever extent Takauere may exist. . ., it would be affected . . . at all by the proposed prison . . . or development for the prison."<sup>78</sup>

This apparent error is compounded by the Court's next point: "[d]isputes about a taniwha are simply not justiciable. The outcome is that the Court does not accept that the claims about the taniwha, *Takauere*, should influence its decision. . .".<sup>79</sup> Intangible values such as beliefs are covered by s. 6(e)—the Court's task may be more difficult when there is uncertainty as to the exact content of the beliefs, but it is wrong to exclude them.

This is one of the issues that subsequently came before the High Court on appeal in *Friends and Community of Ngawha Inc v. Minister of Corrections*.<sup>80</sup> There the appellants submitted that the Environment Court had wrongly excluded spiritual values from its consideration of s. 6(e).<sup>81</sup> Wild J. did not accept this—he found that the Environment Court's referral to *Bleakly* meant that it "... clearly regarded itself as bound. . ." by that decision, and that the Court's conclusion that the claims about the taniwha should not influence its decision was based on its findings that because the prison would not affect the taniwha, it would not affect beliefs in the taniwha. These two things, said the Judge, are "inextricably bound."<sup>82</sup>

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75 Ibid. at para. 50.

76 Ibid. at para. 53.

77 See generally Ahdar, *supra* note 12.

78 Beadle, *supra* note 13 at para. 443.

79 Ibid. at paras 445 and 446.

80 *Supra* note 13.

81 Ibid. at 408.

82 Ibid. at 413.

In fact the Environment Court did not say this at all—its reasoning does not make any link between possible effects on the *taniwha* and effects on beliefs in the *taniwha*. Its focus was squarely on the potential effects of the proposal on the *taniwha* itself. Maybe this was due to how the evidence was presented. This is the view taken by the Court of Appeal—it said that, read as a whole, the Environment Court's decision accommodated the beliefs, and that this was "in reality" what it was doing despite the language it used.<sup>83</sup>

Be that as it may, the High Court was right to say that the RM Act does not require absolute protection of beliefs.<sup>84</sup> Indeed, one of the things I like least about the RM Act is that it does not require absolute protection of anything. Everything is up for grabs under the balancing approach which it is widely accepted as necessitating. That is not to say, as the High Court in *Bleakly* explicitly recognized, that beliefs can never in theory prevail—the focus is on their significance vis a vis the other effects and benefits of proposals.

Under the Act, the matters in ss. 6, 7 and 8 (including beliefs under s. 6(e)) have to be weighed up under the general direction of the Act's purpose as set out in s. 5. And, despite the High Court's misguided qualms about where spiritual beliefs might fit into s. 5, they clearly do.<sup>85</sup> Of course they are not natural or physical resources, but they are, as Williams correctly indicates, part of what enables people to provide for their cultural well-being, and sustainable management includes managing resources to accommodate people's beliefs about matters social, economic and cultural.<sup>86</sup> That is clearly mandated by the Act, and is apparent to the many Maori who, over the years, have come before the Environment Court in an effort to have their traditional beliefs applied in decision-making. The effort has often been in vain because, even if they are recognized, the cultural concerns are frequently lost in the eternal compromise generated by the balancing approach.

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83 Ibid. at 278.

84 *Supra* note 13 at 413.

85 Ibid. at 413. The High Court got stuck on the phrase "natural and physical resources," sharing counsel for the Minister's "...difficulty in following how beliefs can be regarded as a natural and physical resource, or how they can be sustainably managed" (*Friends and Community of Ngawha* (HC)) at 413.

86 Williams, *supra* note 11 at 333.

## 6. CONCLUSIONS

Matters of belief are in New Zealand's environmental legislation. They are, as a matter of law, relevant to environmental decision-making and cannot be ignored. Indeed, references to Maori spiritual belief in environmental legislation are increasing, not decreasing, in number. Two prominent recent examples are to be found in the Marine Reserves bill<sup>87</sup> and recent amendments to the *Resource Management Act*. The bill, like the HSNO and RM Acts, begins by setting out the purpose and principles of the proposed Act. The principles (cl. 9) include the idea that:

[r]ecognition should be given to the importance of protecting undisturbed marine areas for . . . research contributing to Te Ira Tangaroa, to gain a better understanding of the marine environment.

"Te Ira Tangaroa" is defined in cl. 2 as "Maori traditional and contemporary knowledge relating to the life principle of the environment." Decision-makers will need to consider this idea in establishing and managing marine reserves if the bill is enacted. What is more, they will have to do so applying a degree of precaution, as mandated by cl. 10. This provision requires decision-makers to consider the ". . . extent and nature of any uncertainty in information. . ." and "[t]he fact that information is uncertain or incomplete does not, of itself, justify postponing or not making a decision about establishing a marine reserve." If enacted, this will be the strongest formulation of the precautionary approach to make its way into New Zealand law. Unlike the HSNO Act's formulation it is not restricted to scientific uncertainty. It also mandates a course of action—that uncertainty should not be used to avoid taking action—as opposed to merely advocating a cautious approach.

The *Resource Management Act* was amended in 2003 to include ". . . the protection of historical heritage. . ." in the s. 6 list of matters of national importance. This is defined as ". . . those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities: . . . cultural. . ." This simply adds to the Act's other provisions (ss. 6(e) and 8) that are sufficiently broad to include Maori belief.

So long as provisions like these are included in legislation, decision-makers have to deal with unquantifiable belief-based risks and effects. In particular, they should take care to avoid intruding on the values behind the beliefs, and have open minds to the kinds of evidence that are likely

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87 2002, no. 224-1.

to be used to support assertions of belief. Questions about the approach of both ERMA and the Environment Court remain.

Some commentators have argued that the "Maori provisions" in legislation should go, especially those that are wide enough to cover issues of Maori spiritual or cultural belief. Round suggests they are discriminatory and dangerous.<sup>88</sup> Ahdar sees a conflict between their existence and the continuing secularity of the New Zealand state.<sup>89</sup> But, to me, Williams sees the biggest problem: that they may not mean what they say, and thus they disappoint and impoverish Maori.<sup>90</sup> The provisions make issues of belief relevant, but the way they are expressed and included in legislation, and the flexible approach that decision-makers take to the task of applying the legislation in actual cases, means that Maori beliefs are unlikely to be determinative in situations where no compromise between the beliefs and the proposal is possible.

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88 See generally D. Round, "Here be Dragons" (2005) 11 Otago L. Rev. 31.

89 See generally Ahdar, *supra* note 12.

90 Williams, *supra* note 11 at 335-36.